

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE

Owens Corning, *et al.*
Debtors

Bankruptcy No. 00-3837 (JKF)
Chapter 11
Jointly Administered

Owens Corning, *et al.*
Plaintiffs

v.
Michael Burchfield and
R.Q. Whitmire,
Defendants

Adversary No. 03-55737
**Related to Dkt No. 38, Motion for Leave to
File First Amended Counterclaim filed on
Behalf of Defendants; Dkt. No. 39, Motion of
Charles W. Stein and Michael Thaman to Dismiss
First Amended Counterclaim**

Charles W. Stein and
Michael Thaman
Plaintiffs

v.
Michael Burchfield and
R.Q. Whitmire
Defendants

Adversary No. 03-56302

MEMORANDUM OPINION ¹

Before the court are the motions of Burchfield and Whitmire to file an amended counterclaim.² Although leave has not been granted to file the amended counterclaim, Stein and

¹This Memorandum Opinion constitutes the court's findings of fact and conclusions of law.

²We note that the "wherefore" clause in Burchfield and Whitmire's motion in the "wherefore" clause, Dkt. No. 38, seeks leave to file an amended complaint. However, the caption and body of the pleading and the proposed order refer to leave to file amended counterclaim. Although Burchfield and Whitmire assert that this court lacks jurisdiction over their causes of action, they filed proofs of claim in this case and therefore have submitted to this court's jurisdiction.

Thaman have filed at Docket No. 39 a motion to dismiss the first amended counterclaim.³ In October of 2003 Stein and Thaman filed a declaratory judgment action seeking a ruling that Burchfield and Whitmire had no claims against them with respect to Stein's and Thaman's involvement in ServiceLane.com. *See* Adv. No. 03-56302. By order dated December 2, 2003, this court ordered that these adversary matters be consolidated for all purposes and that all documents be filed at Adv. No. 03-55737. ServiceLane.com was a company in which Debtor Owens Corning held an indirect interest and which employed Burchfield and Whitmire. Burchfield and Whitmire filed an answer and counterclaim "individually and derivatively on behalf of ServiceLane.com, Inc.", Dkt. No. 29 at 2, against Stein and Thaman alleging misconduct in connection with Stein's position as an officer of ServiceLane and Stein's and Thaman's status as members of ServiceLane's board of directors. Whether Burchfield and

³We note further that at Docket No. 3 a Motion to Dismiss Counterclaim was filed by Burchfield and Whitmire and an objection thereto was filed by Debtor at Docket No. 6. Neither of these motions has yet been addressed. Although a certification of completion of briefing was filed at Docket No. 9 (erroneously filed by the party as a Certification of Counsel), this court has no record of having received a binder. This court did not receive a certification of completion of briefing with respect to the motions at issue herein but one was filed on January 5, 2005. *See* Dkt. No. 52. The court has no record of having received a binder with respect to the instant motions. However, the parties filed a certification of counsel with a proposed order, which the court signed, with respect to, *inter alia*, scheduling a status conference on these consolidated adversaries after a ruling on the Motion for Leave to File First Amended Counterclaim and the Motion to Dismiss the First Amended Counterclaim.

The original motion to dismiss counterclaim, Dkt. No. 3, states that it was filed in response to a lawsuit filed in the United States District Court for the Northern District of Ohio captioned *ServiceLane.com, Inc. v. Michael Burchfield and R.Q. Whitmire v. Charles W. Stein and Michael Thaman*, Civil Action NO. 3:03CV7448 (the "Ohio Litigation"). The Ohio Litigation seeks damages on behalf of ServiceLane.com for breach of fiduciary duty by its former directors and officers, Charles W. Stein and Michael Thaman. It also seeks damages for alleged fraud.

We note that Stein and Thaman also filed a motion to dismiss counterclaim at Docket No. 30. No related docket entries were noted either on the motion or on the docket. It appears that instead of responding to that motion, Burchfield and Whitmire filed their motion for leave to file amended counterclaim.

Whitmire have standing to sue “derivatively” on behalf of ServiceLane on a claim which is property of that Debtor’s chapter 7 estate, represented by a trustee, is disputed but not material to this motion. We note, however, that Burchfield’s and Whitmire’s counsel, Hill Gilstrap, was appointed as special counsel to ServiceLane’s trustee on a contingent fee basis. *See* Exhibit I to Appendix to Brief of Stein and Thaman in Opposition, Dkt. No. 41, Order dated January 21, 2003, Bankr. No. 01-36044-HCA, U.S. Bankr. Ct., N.D. Tex., Dallas Division). Stein and Thaman moved to dismiss the counterclaim. These motions have not been addressed inasmuch as no notice of completion of briefing was ever filed and the documents were not submitted to the court in accordance with Local Rules, the Case Management Order in effect in this case, and/or Chambers Procedures. Nonetheless, Burchfield and Whitmire filed the instant motion for leave to file first amended counterclaim. Stein and Thaman filed a motion to dismiss the first amended counterclaim. Because the amended counterclaim has not been filed⁴ Stein’s and Thaman’s motion to dismiss it is not ripe. Furthermore, because we will deny Burchfield’s and Whitmire’s motion for leave to file first amended counterclaim, Stein’s and Thaman’s motion will be rendered moot.

In their motion for leave to file amended counterclaim Burchfield and Whitmire allege that since they filed their initial counterclaim they have gained access to certain documentation held by ServiceLane’s bankruptcy trustee. Accordingly, they need to “correct certain allegations to conform to their newly acquired information as well as to remedy some of the pleading issues

⁴It has only been filed as an exhibit to the motion for leave to file first amended counterclaim.

Stein and Thaman have raised.” Motion for Leave to File First Amended Counterclaim, Dkt. No. 38, at unnumbered page 2, ¶¶ 1-5.

ServiceLane was an internet-based home improvement business which filed for protection under chapter 7 of the Bankruptcy Code in July of 2001 in the Bankruptcy Court for the Northern District of Texas. Prepetition, in December of 2000, Owens Corning, ServiceLane and others entered into the ServiceLane Merger Agreement pursuant to which Owens Corning acquired a 54 percent interest in SL.Com, Inc., the parent company of ServiceLane. Owens Corning also had the ability to name two of five members of ServiceLane’s board of directors. Under the Merger Agreement, Owens Corning contributed an existing business line called the Sell, Furnish and Install business (“SFI”). Pursuant to a noncompete agreement between Owens Corning and ServiceLane, Owens Corning was permitted to compete directly with ServiceLane’s business if ServiceLane did not meet certain financial or business goals. Burchfield and Whitmire were “at-will” employees of ServiceLane. Neither held an ownership interest. Both filed claims in this bankruptcy case to which Owens Corning has objected in Adversary 03-55737.⁵

In their proofs of claim filed in Owens Corning’s bankruptcy, Burchfield and Whitmire allege that Owens Corning, Thaman and Stein, “appropriated [ServiceLane’s] business.” Dkt. No. 1 at 10, ¶ 36. *See also id.*, Exhibit B, Proof of Claim, Attachment A at ¶ 37. In July of 2003 Burchfield, Whitmire and ServiceLane filed a civil action in the United States District Court for

⁵Before ServiceLane filed its chapter 7 a secured creditor foreclosed against certain assets. The creditor, Condisco, Inc., transferred all the assets to a third party which, at the time Owens Corning filed its objection to Burchfield’s and Whitmire’s claims, continued to operate under the ServiceLane name.

the Northern District of Ohio, Western Division, asserting claims based on the same allegations contained in their proofs of claim in this case, to-wit, that Owens Corning, through Thaman and Stein, officers of Owens Corning, wrongfully appropriated ServiceLane's business, that Stein and Thaman breached their fiduciary duty to ServiceLane, and that Stein engaged in a fraudulent scheme against Burchfield and Whitmire. *See* Dkt. No. 1, Exhibit D, Complaint filed in U.S. District Court for the Northern District of Ohio, Western Division. Notwithstanding their status as employees of ServiceLane, in the complaint filed in Ohio Burchfield and Whitmire alleged that "they were advised that they would need to temporarily work for Owens Corning to get the infrastructure set up for the spin off company. . . ." Opposition of Plaintiffs to Defendants' Motion to Dismiss Complaint, Exhibit A at ¶ 18, Dkt. No. 22. However, they also assert that in February of 2000 "Owens Corning advised [them] that rather than hire [them] as employees, Owens Corning (from March through December, 2000) would 'spin off' a new company" *Id.* at ¶ 17. That new company was ServiceLane. Burchfield and Whitmire asserted that in order to work for Owens Corning they ceased their own independent business development. *See* Motion to Dismiss Counterclaim at 3, ¶ 7, Dkt. No. 3. *See also* Dkt. No. 38 at 5-6, ¶ 7 (Burchfield's and White's claims arose from "representations and promises made to them by Owens Corning prior to the spinoff of ServiceLane which induced them to provide their business model, plans and prospective customers to Owens Corning in exchange for an ownership interest in the new 'spin-off' company"). They did so based on a series of discussions in which Owens Corning allegedly made "various promises and representations . . . to induce them to share their experience and business model with Owens Corning, with the intent that Owens Corning would

‘spin-off’ [sic] a separate company in which Burchfield and Whitmire would have some ownership interest and control.” *Id.* at ¶ 6, Dkt. No. 38 at 5-6, ¶ 7.

The question before us is whether Burchfield and Whitmire should be granted leave to file an amended counterclaim. Thaman and Stein filed a memorandum styled as an opposition to the motion for leave. *See* Dkt. No. 40. The memorandum, however, attacks the merits of the purported first amended counterclaim and not whether leave should be granted to file it. Nonetheless, we address Burchfield’s and Whitmire’s motion for leave and conclude that it must be denied. Burchfield and Whitmire allege that they “have been given access to certain documents being held by ServiceLane’s bankruptcy trustee”, Dkt. No. 38 at ¶ 4, which, in conjunction with their consideration of Stein’s and Thaman’s motion to dismiss their counterclaim, led them to “believe they need to correct certain allegations to conform their newly acquired information as well as to remedy some of the pleading issues Stein and Thaman” raised. *Id.* at ¶¶ 4-5. With respect to the documentation, Burchfield and Whitmire have not alleged what documents they were able to obtain from ServiceLane’s trustee, they have not alleged why they could not have obtained them earlier, and they have not alleged what significance these documents have to their claims. We note that ServiceLane’s bankruptcy was filed in 2001, the Ohio Action was filed in July of 2003, Adversary 03-55737 was filed in September of that same year, and Adversary 03-56302 was filed in October of 2003. The motion for leave to file first amended counterclaim was not filed until May of 2004. There is no explanation for the delay in obtaining these documents. Burchfield and Whitmire do not allege that they were not aware of the existence of the documents and do not allege when they obtained the documents. Furthermore, the allegations of fraud, misrepresentation, and breach of fiduciary

duty have been raised by Burchfield and Whitmire in other pleadings and in their proof of claim. There is nothing new in the proposed amended counterclaim that could not have been or has not been raised before.

For the foregoing reasons, Burchfield's and Whitmire's motion for leave to file first amended counterclaim will be denied, thereby rendering Stein's and Thaman's motion to dismiss the first amended counterclaim moot.

An appropriate order will be entered.

DATE: January 19, 2005

s/ Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

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Adversary No. 03-56302

**ORDER DENYING MOTION FOR LEAVE TO FILE FIRST AMENDED
COMPLAINT AND DENYING MOTION TO DISMISS SAME AS MOOT**

AND NOW, this 19th day of **January, 2005**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED and DECREED** that the Motion for Leave to File First Amended Counterclaim is **DENIED**.

It is **FURTHER ORDERED** that the Motion of Charles W. Stein and Michael Thaman to Dismiss First Amended Counterclaim is **DENIED as moot**.

It is **FURTHER ORDERED** that a status conference will be held on January 24, 2005, (the omnibus hearing date in Owens Corning) pursuant to the order entered on December 13, 2004, at Docket No. 51. Counsel for all parties must appear.

s/ Judith K. Fitzgerald
Judith K. Fitzgerald
United States Bankruptcy Judge

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